COUNCIL ON COURT PROCEDURES

Established by the Oregon Legislature in 1977

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January 4, 1991

The Honorable John Kitzhaber
President of the Senate
State Capitol
Salem, OR 97310

The Honorable Larry L. Campbell
Speaker of the House
State Capitol
Salem, OR 97310

Re: **Council on Court Procedures (Established by the Oregon Legislature in 1977)**

Dear Messrs. Kitzhaber and Campbell:

Enclosed with this letter are AMENDMENTS TO THE OREGON RULES OF CIVIL PROCEDURE which were promulgated by the Council on Court Procedures on December 15, 1990. This action was taken pursuant to ORS 1.735, and this material is submitted to the Legislative Assembly through your good offices pursuant to that statute.

ORS 1.735 provides that these amendments will go into effect on January 1, 1992, unless the Legislative Assembly, by statute, takes action to amend, repeal or modify them.

A tentative draft of these amendments was published in the Oregon Advance Sheets on August 4, 1990. The Council held public meetings on the following dates: October 14, 1989 in Lake Oswego; December 9, 1989 in Lake Oswego; January 13, 1990 in Lake Oswego; February 10, 1990 in Lake Oswego; March 10, 1990 in Eugene; April 21, 1990 in Newport; May 12, 1990 in Portland; June 9, 1990 in Bend; September 8, 1990 in Lake Oswego; October 13, 1990 in Lake Oswego; November 17, 1990 in Lake Oswego, and December 15, 1990 in Lake Oswego.

Re: **Council on Court Procedures (Established by the Oregon Legislature in 1977)**

At some of these meetings, public testimony was taken regarding the amendments to the rules. The Council also received public comments at meetings on September 8, October 13 and December 15, 1990. In addition, the Council received and considered a number of written comments and suggestions relating to the Oregon Rules of Civil Procedure and the proposed amendments.

The following amendments were promulgated:

1. **The inclusion of a definition of "incapacitated person" in ORCP 7 D, 27 B and 69 B.** This was done to clarify language in light of the original intent of the ORCP.

2. **A modification of ORCP 7 to provide that service of summons in motor vehicle cases does not require notice to a defendant's insurance company, but no default can be taken until such notice is given.** This was done primarily to conform the language of the rule to a recent interpretation of that rule by the Oregon Court of Appeals. The amended language will also require the plaintiff to search the records of the Department of Motor Vehicles to determine if the defendant in fact has a liability insurer. The amendments will also make service upon the Department of Motor Vehicles a secondary or alternative form of service only. In taking this approach, the Council specifically rejected any requirement of diligence or due diligence and provided in ORCP 7 D(7) that the plaintiff be required to make a simple inquiry as to the feasibility of other service methods under ORCP 7, before use of DMV service. ORCP 7 D has been one of the most troublesome rules in the ORCP. It has been repeatedly amended by the Legislature and the Council. It is hoped that these comprehensive amendments will obviate the problems with ORCP 7 and avoid the need for future amendments.

3. **A reinstatement of pleading of noneconomic damages.** The 1987 Legislature added ORCP 18 B, which prohibited pleading of noneconomic damages and required that plaintiff submit a "statement" of the amount claimed as noneconomic damages upon the defendant's request. This statement was not part of the record in the case. ORCP 18 B caused some very severe procedural problems. The rule did not indicate whether the statement furnished would limit the amount of damages recoverable. There was disagreement in interpretation of the

rule among different circuit courts in the state. Since the statement was not part of the record, it was difficult to see how it could provide a formal limitation on damages. Also, the jurisdiction of the court may depend upon the amount in controversy. Without a clear indication in the record to that effect, the court was left with uncertainty as to the existence of jurisdiction and potential ambiguity relating to the validity of judgment.

The Council considered eliminating the requirement of the statement. It also considered requiring that the statement be made part of the formal record and limit damages. The Council, however, elected to simply eliminate 18 B as the best approach. Any reasons for not pleading noneconomic damages are greatly outweighed by the advantage of having a clear indication in the record of the amount in controversy in the case.

4. **An amendment of ORCP 55 and ORCP 43 to provide a pretrial subpoena without requirement of a deposition.** Prior to this amendment, a party who wished to secure papers in the hands of a non-party witness was required to schedule a deposition and summon the person possessing the documents to that deposition. This required a needless expense in many cases when all that a party wished to do was to examine documents. The new subpoena provision requires a seven-day notice to all parties prior to service of the subpoena, and the party possessing the documents must be given 14 days in which to respond to the subpoena. The party required to produce the documents may file an objection to the subpoena, and the party seeking the documents must then obtain a court order to enforce the subpoena. The Council decided not to require that all other parties be allowed to be present and examine documents obtained. Other parties can issue their own subpoenas for records which they desire.

The Council also amended ORCP 55 H relating to subpoena of hospital records in order to more clearly define the institutions which can be subject to the ORCP 55 H procedure. The Council considered expanding the procedure in ORCP 55H to institutions other than health care facilities, but ultimately decided not to do this. In the course of examining ORCP 55 H, it was determined that the definition of health care institutions subject to the procedure was incorrect. The

Re: **Council on Court Procedures (Established by the Oregon Legislature in 1977)**

Council added one form of health care institution, county mental health programs, and excluded a number of other institutions previously listed that were not in fact health care facilities.

5. **An extension of the application of ORCP 68 to dissolution cases.** The Council changed ORCP C(1) to provide that the attorney fee procedure in ORCP 68 applies to dissolution cases. The original Oregon Rules of Civil Procedure, for reasons that were not entirely clear, did not apply the ORCP 68 procedure to dissolution cases. Council members familiar with domestic relations cases suggested that there was no rational reason not to do so. The Council also consulted the Oregon State Bar Family & Juvenile Law Section, which heartily endorsed application of the ORCP 68 procedure to dissolution cases.

6. **A clarification in the attorney fees judgments under ORCP 68.** The Council amended ORCP 68 C to provide that a judgment for attorney fees and costs and disbursements, if entered after the judgment on the principal claim in the case, is a separate supplemental judgment that must be separately entered and appealed. The Council considered requiring that no judgment at all be entered until after the attorney fees and costs and disbursements issues were settled, but felt that it was better to allow entry of judgment on the principal case with a later separate entry of judgment for attorney fees and costs and disbursements. The Council also considered and rejected a special procedure to apply to default cases, and the promulgated amendment treats default cases the same as all other cases.

The promulgated amendment is consistent with the existing statutes relating to appellate procedure. The Office of the State Court Administrator had submitted a bill in the last legislative session which would have made amendments to ORCP 68 C. At the request of the Council, the bill was withdrawn to allow the Council to consider the matter. The proposed amendments which the Council promulgated were submitted to the Office of the State Court Administrator and to the Oregon State Bar Procedure & Practice Committee. Comments received from these groups resulted in modification of the proposed amendments, and the State Court Administrator's Office has indicated that they support the

Re: **Council on Court Procedures (Established by the Oregon Legislature in 1977)**

proposed amendment to ORCP 68 C. The Council also consulted with the Office of the State Court Administrator relating to amendments to statutes in ORS Chapter 19 regarding appeals of attorney fees judgments, and a proposed statutory amendment will be submitted by the Office of the State Court Administrator.

7. **Clarification of the procedures for submission of forms of judgment.** The Council eliminated ambiguous language in ORCP 70 C relating to the timing and obligation to submit forms of judgments when prepared by attorneys. The Council decided that the best approach was to leave the matter to the discretion of the trial judge in a particular case.

In addition to the amendments promulgated, the Council considered action in several areas but decided not to promulgate amendments. The most important of those areas were expert discovery and interrogatories. The Oregon State Bar Procedure & Practice Committee asked the Council to consider the advisability of promulgating rules regulating discovery of experts and interrogatories. The Council declined to consider the matter of promulgating rules providing for interrogatories but did agree to review the question of discovery of expert witnesses.

After exhaustive public hearings, the Council first decided that the only possible amendment that it would consider promulgating was one that would provide for the disclosure of the name, address and qualifications of expert witnesses with no further discovery possible. The Council, however, ultimately declined to promulgate this amendment.

The Council also received requests and declined to amend the rules governing service on incapacitated persons, relating to discovery abuse, providing a procedure in ORCP 67 which would have authorized plaintiffs to make offers of judgment and cutting off attorney fees if the judgment was less than the offer, and regulating the taxing of costs of legal assistants.

The Council also considered the subject of alternate jurors. It decided to delay further action on that subject until action was taken by the Office of the State Court Administrator and the Oregon State Bar Criminal Law Section. No action was taken by those groups; the subject may be

Re: **Council on Court Procedures (Established by the Oregon Legislature in 1977)**

reviewed by the Council during the next biennium. The Council also delayed action until the next biennium regarding suggestions received in the fall of 1990 relating to sealing settlement records, amending ORCP 54 A(3), reducing the number of papers filed with the court, and amending ORCP 67 B.

If I can provide any further information relating to this submission, please contact me.

Very truly yours,

R. L. MARCEAU, Chair
COUNCIL ON COURT PROCEDURES

Enclosure

cc: Chair, Senate Judiciary Committee
Chair, House Judiciary Committee

cocp0104.txt

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 15, 1990

COUNCIL ON COURT PROCEDURES

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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 1991 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 1992, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1989-91 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. The comment which follows each rule was prepared by Council staff. Those comments represent staff interpretation of the rules and the intent of the Council, and are not officially adopted by the Council. Subdivisions of rules are called sections and are indicated by capital letters, e.g., A; subdivisions of sections are called subsections and are indicated by Arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and are indicated by lower case letters in parentheses, e.g., (a), and subdivisions of paragraphs are called subparagraphs and are indicated by lower case Roman numerals in parentheses, e.g., (iv).

The amended rules are set out with both the current and amended language. Underscoring (with boldface) denotes new language while bracketing indicates language to be deleted.

The Council held public meetings on October 14, 1989 in Lake Oswego; December 9, 1989 in Lake Oswego; January 13, 1990 in Lake Oswego; February 10, 1990 in Lake Oswego; March 10, 1990 in Eugene; April 21, 1990 in Newport; May 12, 1990 in Portland; June 9, 1990 in Bend; September 8, 1990 in Lake Oswego; October 13, 1990 in Lake Oswego; November 17, 1990 in Lake Oswego, and December 15, 1990 in Lake Oswego.

The Council expresses its appreciation to the bench and the Bar for the comments and suggestions it has received.

TABLE OF CONTENTS

SUMMONS
RULE 7

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D. Manner of service.

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D.(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D.(3)(a) **Individuals.**

* * * * *

D.(3)(a)(iii) **Incapacitated persons.** Upon an incapacitated person **as defined by ORS 126.003(4)**, by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

* * * * *

D.(4) **Particular actions involving motor vehicles.**

D.(4)(a) **Actions arising out of use of roads, highways, and streets; service by mail.**

D.(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf [, except a defendant which is a foreign corporation maintaining a registered agent within this state,] **who cannot be served with summons by any method specified in subsection 7 D.(3)**

of this rule, may be served with summons [by personal service upon the Motor Vehicles Division and mailing by registered or certified mail, return receipt requested, a copy of the summons and complaint to the defendant and the defendant's insurance carrier if known.]

[D.(4)(a)(ii) Summons may be served] by leaving one copy of the summons and complaint with a fee of $12.50 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons **or by mailing such summons and complaint with a fee of $12.50 to the office of the Administrator of the Motor Vehicles Division by registered or certified mail, return receipt requested.** The plaintiff [, as soon as reasonably possible,] shall cause to be mailed by registered or certified mail, return receipt requested, a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, **and at** the most recent address as shown by the Motor Vehicles Division's driver records, and **at** any other address of the defendant known to the plaintiff, which might result in actual notice [and to the defendant's insurance carrier if known] **to the defendant.** For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon [such] **the date of the first** mailing **to the defendant.**

D.(4)(a)[(iii)] **(ii)** The fee of $12.50 paid by the plaintiff

to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D.(4)(b) **Notification of change of address.** Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D.(4)(c) **Default.** No default shall be entered against any defendant served [by mail] under this subsection [who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to

the defendant's insurance carrier or that the defendant's insurance carrier is unknown] **unless the plaintiff submits an affidavit showing:**

(i) that summons was served as provided in subparagraph D.(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D.(4)(a)(i) of this rule have been made; and

(ii) either, if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Motor Vehicles Division accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and

(iii) that service of summons could not be had by any method specified in subsection 7 D.(3) of this rule.

* * * * *

D.(7) Defendant who cannot be served. A defendant cannot be served with summons by any method specified in subsection 7 D.(3) of this rule if the plaintiff attempted service of summons by all of the methods specified in subsection 7 D.(3) and was unable to complete service, or if the plaintiff knew that service by such methods could not be accomplished.

COMMENT

The 1973 Legislature substituted the term "incapacitated person" for "incompetent person" in a number of sections of the Oregon Revised Statutes and supplied a definition of the new term which appears in ORS 126.003(4). Some of these former ORS sections are now in the Oregon Rules of Civil Procedure and the Council added a specific reference to the statutory definition to make clear that the definition applies to the ORCP as well as ORS sections.

The Council amendment of ORCP 7 D makes two major changes in motor vehicle service provided by that section: (1) The new language separates the requirements necessary for adequate service of summons from the conditions for securing a default, and (2) service of summons on the Department of Motor Vehicles under ORCP 7 D(4) becomes an alternative form of service which is only available when service cannot be made upon the defendant by any of the methods specified in ORCP 7 D(3).

The first major change was a reaction to Hoyt v. Paulos, 96 Or App 91, 93-94 (1989). In that case, the Oregon Court of Appeals held that delivery of a copy of the summons and complaint to the defendant's insurance company was not part of service of summons for limitation purposes. The new language makes clear that under 7 D(4)(a)(i) the actual service of process only requires service upon the Department of Motor Vehicles and supplementary mailing to the defendant. Presumably this would satisfy the statute of limitations. However, no default is possible under 7 D(4)(c) until 14 days after the defendant takes the added step of mailing to defendant's insurer if one is known or can be identified. The amended language clearly requires the plaintiff to make inquiry of the Department of Motor Vehicles to determine whether their records show an insurer for the defendant. It also allows service on the DMV to be by mail as well as personal delivery to a DMV office. The new language makes clear that if mailing is required to multiple addresses for a defendant, service is complete upon the first mailing.

The second major change reflects some concern regarding the effectiveness of notice to a defendant by service upon the Department of Motor Vehicles. By making such service only available as an alternative to forms of service under ORCP 7 D(3), DMV service when used would be the most reasonable one available under the circumstances. A new subsection, ORCP 7 D(7), makes clear that the plaintiff is only required to show a reasonable effort to use the methods available under ORCP 7 D(3), similar to the showing required for use of 7 D(6), and not the extensive search for defendant required in cases interpreting earlier statutory language such as Ter Har v. Backus, 259 Or 478 (1971). This would not require a defendant to actually attempt all forms of service described in ORCP 7 D(3), only to

investigate whether service could be completed by any of those methods.

(AMENDMENT AS PROMULGATED 12-15-90; BRACKETS DENOTE DELETIONS.)

CLAIMS FOR RELIEF
RULE 18

[Claims for relief. A.] A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A.[(1)] A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.

[A.(2)] **B.** A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated[, except as provided in section B of this rule]; relief in the alternative or of several different types may be demanded.

[B. (1) The amount sought in a civil action for noneconomic damages, as defined in ORS 18.560, shall not be pleaded in a complaint, counterclaim, cross-claim or third-party claim.

B.(2) The prayer in such actions shall contain only a demand for the payment of damages without specifying the amount.

B.(3) The party making the claim may supply to any adverse party a statement of the amount claimed for such damages, and shall do so within 10 days of a request for such statement. The request and the statement shall not be made a part of the trial court file.]

COMMENT

The 1987 Legislature provided in ORCP 18 B that noneconomic damages not be pleaded in the complaint. In ORCP 18 B(3), the legislature did require that the party making the claim provide the defendant with a written statement of noneconomic damages claimed. The Council received a number of inquiries whether the

statement of noneconomic damages actually limited the amount that could be recovered. The question was difficult to answer either from the language of 18 B(3) or its legislative history. One difficulty presented was that the written statement of noneconomic damages was not part of the record in the case.

The Council felt that the value of having a reliable statement in the record of the amount of damages sought by the plaintiff was greater than the value of avoiding publicity about a case. The amount claimed by the plaintiff may determine whether a claim is being made in excess of insurance coverage and whether an insured must retain a separate attorney. It also may control subject matter jurisdiction. The simplest way to have the record clearly show the amount claimed was to have the plaintiff include all damages in the complaint. The Council therefore eliminated 18 B.

MINOR OR INCAPACITATED PERSONS
RULE 27

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B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person **as defined by ORS 126.003(4)**, who has a conservator of such person's estate or a guardian, is a party to any action, the incapacitated person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the incapacitated person does not have a conservator of such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B.(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

B.(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

COMMENT

The 1973 Legislature substituted the term "incapacitated person" for "incompetent person" in a number of sections of the Oregon Revised Statutes and supplied a definition of the new term which appears in ORS 126.003(4). Some of these former ORS sections are now in the Oregon Rules of Civil Procedure and the Council added a specific reference to the statutory definition to

make clear that the definition applies to the ORCP as well as ORS sections.

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES RULE 43

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D. Persons not parties. **A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as provided in Rule 55.** This rule does not preclude an independent action against a person not a party for [production of documents and things and] permission to enter upon land.

COMMENT

See comment to ORCP 55.

SUBPOENA
RULE 55

A. Defined; form. A subpoena is a writ or order directed to a person and **may** require[s] the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned **or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place**. [It also] **A subpoena requiring attendance to testify as a witness** requires that the witness remain [till] **until** the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

B. For production of [documentary evidence] books, papers, documents, or tangible things and to permit inspection. A subpoena may [also] command the person to whom it is directed to produce **and permit inspection and copying of designated** [the] books, papers, documents, or tangible things [designated therein; but] **in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection**

and copying of designated books, papers, documents or tangible things but not commanded to also appear for deposition, hearing or trial may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents or tangible things the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance.

C.(1) **By whom issued.** A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the

attendance of a person, to produce books, papers, documents or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 **C.**, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C.(2) **By clerk in blank.** Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; service on law enforcement agency; service by mail; proof of service.

D.(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other

person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C.(6), shall be served in the same manner as provided for service of summons in Rule 7 D.(3)(b)(i), D.(3)(d), D.(3)(e), or D.(3)(f). **Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.**

D.(2) **Service on law enforcement agency.**

D.(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of

the law enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

D.(3) **Service by mail.**

Under the following circumstances, service of a subpoena to a witness by mail shall be the same legal force and effect as personal service otherwise authorized by this section:

D.(3)(a) The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent,

has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D.(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D.(3)(c) The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

D.(3)(d) Service of subpoena by mail may not be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D.(4) **Proof of service.** Proof of service of a subpoena is made in the same manner as proof of service of a summons.

E. Subpoena for hearing or trial; prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions or requiring production

of books, papers, documents, or tangible things; place of production and examination.

F.(1) **Subpoena for taking deposition.** Proof of service of a notice to take a deposition as provided in Rules 39 **C.** and 40 **A.**, **or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D.(1) of this rule** or a certificate that such notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. [The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 **B.**, but in that event the subpoena will be subject to the provisions of Rule 36 **C.** and section **B.** of this rule.]

F.(2) **Place of examination.** A resident of this state who is not a party to the action may be required by subpoena to attend an examination **or to produce books, papers, documents, or tangible things** only in the county wherein such person resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend **or to produce books, papers, documents or tangible things** only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by

an order of court.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.

H. Hospital records.

H.(1) **Hospital.** As used in this section, unless the context requires otherwise, "hospital" means a [hospital] **health care facility defined in ORS 442.015(13)(a) through (d) and** licensed under ORS 441.015 through [441.087, 441.525 through 441.595, 441.815, 441.820, 441.990, and 442.342 through 442.450] **441.097 and community health programs established under ORS 430.610 through 430.700.**

H.(2) **Mode of compliance.** Hospital records may be obtained by subpoena duces tecum as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of

a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than [ten] **14** days prior to service of the subpoena on the hospital.

H.(2)(c) After filing and after giving reasonable notice in

writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H.(2)(d) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D. of this rule.

H.(3) **Affidavit of custodian of records.**

H.(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time

of the act, condition, or event described or referred to therein.

H.(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) **Personal attendance of custodian of records may be required.**

H.(4)(a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H.(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

COMMENT

The Council revised ORCP 55 and 43 to provide for use of a subpoena to require a non-party to produce books, papers, documents or tangible things and permit inspection thereof without scheduling a deposition. In Vaughan v. Taylor, 79 Or App 359 (1986), the Court of Appeals held that production of documents in the hands of a non-party could only be accomplished by scheduling a deposition. Under the new procedure, a subpoena for production may be used without scheduling a deposition.

The non-depostion subpoena for production and inspection must be served on each party seven days before the subpoena can be served upon the person required to produce the material. The person required to produce material must be given 14 days to respond. Both periods may be shortened by court order. The non-party subject to such subpoena may either secure a court order to control production or simply file objections to the requested production. If objections to production are filed, the party seeking production is required to secure a court order before any production is allowed.

Service by mail would not be allowed for a non-deposition subpoena for production. A non-deposition subpoena also cannot be used to force a non-party to allow entry upon land.

The Council decided that the existing definition of "hospital" in ORCP 55 H(1) was incorrect. The corrected definition includes traditional hospitals which treat the mentally or physically ill, rehabilitation centers, college infirmaries, chiropractic facilities, facilities for the treatment of alcoholism or drug abuse, and any other facilities which the Health Division determines are classified as "hospitals". Also included are: hospital-associated ambulatory surgery centers, which are surgery centers operated by hospitals but independently from the hospital campus; long-term care facilities, including both skilled nursing facilities and intermediate care nursing facilities; free-standing ambulatory surgery centers, such as those operated by many physicians groups; and, county mental health clinics. All of these, except county mental health clinics, were included in the prior definition. The new definition excludes some organizations that were covered by the prior definition, including free standing birthing centers, health maintenance organizations, and hospital

facility authorities. The definition is limited to a "licensed health care facility." It does not include the records of doctors' or chiropractors' offices. Discovery of doctors' or chiropractors' records is covered under ORCP 44.

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

* * *

C. Award of and entry of judgment for attorney fees and costs and disbursements.

C.(1) **Application of this section to award of attorney fees.** Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except where:

[C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or]

C.(1)[(b)]**(a)** Such items are claimed as damages arising prior to the action; or

C.(1)[(c)]**(b)** Such items are granted by order, rather than entered as part of a judgment.

C.(2) **[Asserting] Alleging [claim for] right to attorney fees.** A party seeking attorney fees shall [assert the right to recover such fees by alleging] **allege** the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. [A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient.] **Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in**

this subsection.

C.(2)(b) If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be [asserted by a demand for attorney fees] **alleged in** such motion, in [substantially] similar form to the allegations required [by this subsection] **in a pleading**.

C.(2)(c) A party shall not be required to allege a right to a specific amount of attorney fees. An allegation that a party is entitled to "reasonable attorney fees" is sufficient.

C.(2)(d) [Such allegation] **Any allegation of a right to attorney fees in a pleading or motion** shall be [taken as] **deemed** denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of facts, statute, or rule which provides a basis for the award of fees shall be waived if not [asserted] **alleged** prior to trial **or hearing**. [Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.]

C.(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

[C.(4) **Award of attorney fees and costs and disbursements; entry and enforcement of judgment.** Attorney fees and costs and

disbursements shall be entered as part of the judgment as follows:]

[C.(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C.(4)(a)(i) Serves, in accordance with Rule 9 **B.**, a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C.(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 **C.**, with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C.(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule

23.]

[C.(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C.(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

C.(4) Procedure for seeking attorney fees or costs and disbursements. The procedure for seeking attorney fees or costs and disbursements shall be as follows:

C.(4)(a) Filing and serving statement of attorney fees and costs and disbursements. A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

C.(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C.; and

C.(4)(a)(ii) Serve, in accordance with Rule 9 B., a copy of the statement on all parties who are not in default for failure to appear.

C.(4)(b) Objections. A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be served within 14 days after service on the objecting party of a copy of the statement. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Hearing on objections.

C.(4)(c)(i) If objections are filed in accordance with paragraph C.(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C.(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary.

C.(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees or costs and disbursements sought in the statement.

[C.(5) Enforcement. Attorney fees and costs and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees and costs

and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees and costs and disbursements by the court pursuant to (4)(d) of this section.]

C.(5) Judgment concerning attorney fees or costs and disbursements.

C.(5)(a) As part of judgment. When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to Rule 67 is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C.(5)(b) By supplemental judgment; notice. When any issue regarding attorney fees or costs and disbursements has not been determined before a judgment pursuant to Rule 67 is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and entered and notice shall be given to the parties in the same manner as provided in Rule 70 B.(1).

C.(6) **Avoidance of multiple collection of attorney fees and costs and disbursements.**

C.(6)(a) **Separate judgments for separate claims.** Where separate final judgments are granted in one action for separate claims pursuant to Rule 67 **B.**, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney

fees and costs and disbursements in more than one such judgment.

C.(6)(b) **Separate judgments for the same claim.** When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 **B.** separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

COMMENT

The Council changed ORCP 68 C(1) to make the procedure for recovery of attorney fees and costs and disbursements in ORCP 68 applicable to dissolution cases.

The Council made minor changes in ORCP 68 C(2). It changed several references to "assert" attorney fees and costs and disbursements in a pleading or motion to "allege" such fees or costs and disbursements. It made clear that no response is required to such an allegation, whether the allegation is made in a responsive pleading or a motion. It also divided the section into subsections and changed the order of the sentences in the subsections for purposes of clarity.

The Council changed the procedure for award of attorney fees or costs and disbursements in ORCP 68 C(4). The existing language refers to entry of an award of attorney fees or costs and disbursements "as part of the judgment" in the case. The new language attempts to conform the rule to the language in ORS 20.220 which treats any award of attorney fees or costs and disbursements, subsequent to the judgment on the main claim, as a separate judgment. ORCP 68 C(5)(a) provides that, if the attorney fees and costs and disbursements award is finally determined prior to entry of judgment on the principal claim, the award is included in the principal judgment. In the more usual case, where the attorney fees or costs and disbursements award is not determined before the entry of judgment on the principal claim, ORCP 68 C(5)(b) provides for entry of an entirely separate

supplemental judgment.

The new language changes the procedure for entry of judgments for attorney fees or costs and disbursements in several other respects. Under the existing rule, the clerk enters judgment for the amount claimed in the attorney fees or costs and disbursements statements. If objections are filed, the enforceability of that judgment is suspended until the court rules on the objections. Under the new rule, no judgment is entered for attorney fees or costs and disbursements until after the time for objections expires. If no objections are filed, the court enters judgment for the attorney fees or costs and disbursements. If objections are filed, the court enters judgment for attorney fees or costs and disbursements after hearing and determining such objections. Under the existing procedure, the clerk automatically entered the amount claimed in the statement of attorney fees or costs and disbursements. Under the new ORCP 68 C(4)(d), the court may enter the amount claimed in the absence of objection, but is not required to do so. The court would thus have discretion to pass on the reasonableness of the amounts claimed even if there is no objection. This eliminated the necessity of requiring court approval of attorney fees in default judgment situations.

* * * * *

B. Entry of default judgment.

B.(1) **By the court or the clerk.** The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract;

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B.(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person **as defined by ORS 126.003(4)** and such fact is shown by affidavit;

B.(1)(e) The party seeking judgment submits an affidavit of the amount due;

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i), 7 D.(3)(b)(i), 7 D.(3)(e) or 7 D.(3)(f).

B.(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no

judgment by default shall be entered against a minor or an incapacitated person **as defined by ORS 126.003(4)** unless the minor or incapacitated person has a general guardian or is represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

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COMMENT

The 1973 Legislature substituted the term "incapacitated person" for "incompetent person" in a number of sections of the Oregon Revised Statutes and supplied a definition of the new term which appears in ORS 126.003(4). Some of these former ORS sections are now in the Oregon Rules of Civil Procedure and the Council added a specific reference to the statutory definition to make clear that the definition applies to the ORCP as well as ORS sections.

FORM AND ENTRY OF JUDGMENT
RULE 70

* * * * *

C. Submission of forms of judgment. Attorneys shall submit proposed forms for judgment at the direction of the court rendering the judgment. The proposed form must comply with section **A.** of this rule. [When so ordered by the court, the proposed form of judgment shall be served five days prior to the submission of judgment in accordance with Rule 9 **B.** The proposed form of judgment shall be filed and proof of service made in accordance with Rule 9 **C.**]

* * * * *

COMMENT

The Council decided that the existing language in ORCP 70 C relating to service of proposed forms of judgment by the parties was unclear. It decided to leave the question of the conditions relating to the submission of judgment to direction of the court in the particular case. The court in directing submission of proposed judgment forms has ample authority to direct the circumstances of such submission. The Council eliminated the last two sentences of ORCP 70 C.